

APPEAL NO. 010783
FILED JUNE 18, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on April 3, 2001. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) did not sustain a compensable injury on _____; that the claimant has not had disability; that the claimed injury occurred while the claimant was in a state of intoxication as defined by Section 401.013; and that the respondent (carrier) timely contested the claim. The claimant appealed and the carrier responded.

DECISION

The hearing officer's decision is affirmed.

The hearing officer did not err in determining that the claimant's injury of _____, occurred while the claimant was in a state of intoxication as defined by Section 401.013. The hearing officer's decision on the intoxication issue is supported by the claimant's drug test which was positive for marijuana and by the testimony and report of a forensic toxicologist. The conflicting evidence regarding this issue was for the hearing officer to resolve as the finder of fact. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a).

The hearing officer did not err in determining that the carrier timely contested the claim. The carrier first received written notice of the claimed injury on September 18, 2000, and disputed the compensability of the claim on September 27, 2000, which was within the 60-day time period provided in Section 409.021(c). The Texas Workers' Compensation Commission is not applying the decision in Downs v. Continental Casualty Co., 32 S.W.3d 260 (Tex. App.-San Antonio 2000, pet. granted), regarding a seven-day dispute period, pending continued legal action on that case. See Texas Workers' Compensation Commission Appeal No. 010335, decided March 29, 2001, and Texas Workers' Compensation Commission Advisory 2001-02.

The hearing officer did not err in determining that the carrier's expert witness was exempt from "the rule" and in allowing that expert to hear the claimant's testimony. TEX. R. CIV. EVID. 614 provides for the exclusion of witnesses at the request of a party so that they cannot hear the testimony of other witnesses and provides for certain exceptions, one of which is a person whose presence is shown by a party to be essential to the presentation of the party's cause. In Drilex Systems, Inc. v. Flores, 1 S.W.3d 112 (Tex. 1999), the court noted that, although an expert witness may typically be found to be exempt under the essential presence exception, experts are not automatically exempt, and that Rule 614 vests in trial judges broad discretion to determine whether a witness is essential. See *also* Elbar, Inc. v. Claussen, 774 S.W.2d 45 (Tex. App.-Dallas 1989, writ dismissed) wherein the court noted that the essential presence exception is typically invoked for expert witnesses.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Susan M. Kelley
Appeals Judge